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Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~133~~ 10

WILLIAM GIGLIO and FRANK LIVORSI,
Petitioners,

—against—

UNITED STATES OF AMERICA

REPLY BRIEF OF PETITIONERS GIGLIO AND LIVORSI

On Application for Writ of Certiorari

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WILLIAM GIGLIO and FRANK LIVORSI, *Petitioners,* —*against*— UNITED STATES OF AMERICA	No. 133

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1. Neither *Costello* v. *United States*, 350 U. S. 359, nor *Holt* v. *United States*, 218 U. S. 245, supports the proposition that a prosecutor may flout a defendant's constitutional privilege against self-incrimination, obtain tainted evidence thereby, use that tainted evidence before the grand jury and, even if the indictment thus obtained is struck down by the court, obtain another indictment by resubmitting the tainted evidence or leads and clues obtained therefrom. In *Holt*, which was a prosecution in a federal court for murder committed on a military reservation, an army captain testified before the grand jury to admissions made by the prisoner obtained under circumstances that made them incompetent. There was nothing in the case to indicate that the prosecutor had violated any of the defendant's constitutional rights before the grand jury. In *Costello*, the grand jury acted on the basis of hearsay.

This court did not consider in *Costello*, or in *Holt*, the vital question presented in this case, namely, whether a defendant is entitled to the dismissal of an indictment if he can establish that evidence presented to the grand jury was obtained as a result of the violation of his constitu-

tional rights *by the prosecuting authorities.* This court considered in neither *Costello* nor *Holt* the situation presented here where the defendants' constitutional privilege against self-incrimination was deliberately invaded by the prosecutor before the grand jury and, after the dismissal of the indictment on that very ground, the defendants were precluded from ascertaining whether tainted evidence, or leads and clues obtained therefrom, were employed to obtain an identical superseding indictment.

It is of the utmost importance, both as a matter of constitutional interpretation and in connection with the administration of justice in the federal courts, that federal prosecutors be told, in no uncertain terms, that they may not, with impunity, obtain indictments by flagrantly violating a defendant's privilege against self-incrimination before the grand jury. For that is exactly what the decision below sanctions and encourages.

2. What is involved here is not a mere technical invasion of the defendants' rights. The prosecutor, after filing informations in 1950 charging offenses under the Internal Revenue Code against the defendants, and while the investigation of their tax affairs continued, subpoenaed them in 1952 before a federal grand jury in what purported to be a "John Doe" proceeding. When the defendant Giglio asserted his privilege against self-incrimination and was brought before Judge T. Hoyt Davis for a ruling, the following colloquy between court and prosecutor took place (102a-103a):

> "The Court: Well, is he being investigated, himself?
>
> Mr. Leone: These various companies are being investigated, your Honor.
>
> The Court: The defendant himself is not under investigation?
>
> Mr. Leone: Well, it is a John Doe investigation, and the witness appeared in response to subpoena duces tecum.

The Court: I see.

Mr. Leone: The witness was asked to produce certain records of certain companies, and it has been established that he was either a partner in some of these companies, or that he was an officer of the corporation.

Now, the investigation is a John Doe proceeding, and it might very well be that in time he would be the subject of an investigation—I don't say that he is not—but at the present time these companies are under investigation, your Honor.

The Court: And these corporations.

All these questions are all as to the whereabouts of the books; is that correct?

Mr. Leone: That is correct, your Honor.

The Court: Where they are located.

Mr. Leone: That is correct.

The Court: I don't see any reason why he shouldn't answer the questions."

There is no dispute about the fact that the defendant Giglio not only was, at that very moment, a defendant in a criminal case but he was likewise the quarry in an intensive continuing investigation by the government. Not only did the prosecutor thus grossly misrepresent the defendant's situation to the court, but after he had obtained a ruling that Giglio was required to reveal certain information concerning corporate books (103a), he brought the defendant before the grand jury and forced him to reveal the whereabouts of, and to produce, eighty cartons of his personal partnership papers (108a-110a; 133a).

Judge Goddard dismissed the 1952 indictments in an action unprecedented in either the Southern District of New York or, for aught we know, elsewhere. He indulged in what Judge Palmieri, after hearing the facts, referred to as a "terrifying exercise of discretion" (170), predicated on "a plain and clear and admitted violation of the constitutional privilege" (157).

The "performance of government counsel before Judge Davis" (169) was characterized by Judge Palmieri as "scandalous" (147) and "a rather shocking and unpleasant transaction, to say the least" (169).

3. As to the unsuccessful attempts by the defendants to ascertain whether tainted evidence, or leads and clues therefrom, were being employed against them at the trial, the government simply contends that the defendants were not denied that right. There is no question, however, that counsel for the defendants repeatedly attempted to ascertain whether tainted evidence, and leads and clues therefrom, were being used by the government at the trial and it is equally clear that the trial court, on every occasion where that inquiry might have borne fruit, flatly forbade it. The record clearly reveals that court, prosecutor and defendants' counsel fully understood the nature and effect of the court's exclusionary rulings and that there never was any question below that the defendants were being precluded, either by cross-examination or by calling witnesses, from ascertaining whether tainted evidence had infected the trial.

The first instance occurred when the defendant Roth took the stand as a government witness and counsel for the defendants attempted to lay the foundation for proof that tainted evidence had been injected into the trial. The government's brief (p. 21) quotes from an exchange between court and counsel in an attempt to demonstrate that Mr. Stryker was seeking merely the right to inquire into the legality of the indictment. The balance of the colloquy, however, clearly indicates that every one understood that the problem also involved the admissibility of trial evidence. Thus, the prosecutor during the very same colloquy, stated (1353):

> "It is a question of—as to the admissibility of evidence, and if there is any further foundation that counsel thinks he can present to the Court, I of course can have no objection to his doing so."

Indeed, the prosecutor finally assented to the interrogation of Roth concerning the use of tainted evidence at the trial (1354), but the trial judge was adamant, stating (1354):

> "* * * I want to keep this trial as simple as I can * * * and I don't want get off into this question of documents, even though you might have no objection to it."

When the same question came up during the cross-examination of the government agent, Theodore Present, who had carefully assorted and analyzed the eighty cartons of documents which Giglio was compelled to produce, and was thus likely to be thoroughly familiar with all of the leads and clues which the government might have obtained therefrom, the court observed (1958):

> "Now, it seems to me that here I have the additional question of making sure there is nothing that has come before this jury, this trial jury, which could be attributed to improperly secured records."

Nevertheless, the court continued (id.):

> "Now, you wanted to have a hearing at this time outside the presence of the jury. Before I take that time, I would like to know what foundation there is for it * * *."

On the defendants' motion to dismiss, at the close of the prosecution's case counsel pointed out to the court that the defendants had not been permitted to examine the key government witnesses concerning the use of tainted evidence, or leads and clues obtained therefrom, at the trial. When the court inquired of counsel whether there was "anything in this trial before this jury that has been improperly obtained," Mr. Stryker responded (2077):

> "The point was really that we were not able to find out whether those things were improperly obtained or not. * * * we were not allowed, not permitted to inquire into the fact. That is the point * * *."

If it were true, as the government now contends and as the Court of Appeals found, that the defendants "had a right of full cross-examination during the trial as to the sources of government exhibits," then the trial judge and the prosecutor both would have taken this position in these colloquies. The trial court took no such position but persisted in demanding that the defendants furnish him with an "additional foundation" (2078). The trial judge repeatedly took the position expressed in the statement (1945):

> "No, Judge Palmieri said there wasn't enough foundation to start laying one * * * and I think that is about the way I feel about it."

Time after time, the court enunciated the requirement that the defendants furnish a further "foundation" while refusing to permit them to examine government witnesses who were cognizant of the facts (2081). Defendants' counsel repeatedly pointed out that he had not been able to prove where the government got its evidence because of the restrictive rulings of the court. Thus, Mr. Stryker stated (2081):

> "Now, where did the Government get that information. I haven't proved where they got it because, as I understand the ruling, I was not allowed to go into that inquiry * * *."

Not only did the trial judge and the prosecutor fail to protest the accuracy of these summarizations of the court's rulings, but the court signified its acquiescence by insisting once again that a further foundation be supplied before such an inquiry could be made (2085).

The question presented to this court is whether the defendants, having established the use of tainted evidence by the government before the 1952 grand jury, were not entitled to a hearing on the issue of the suppression of that evidence, and of leads and clues obtained therefrom. The further question presented is whether, under such circumstances, the burden rests upon the government or upon the defendants of establishing the independent origin of the evidence employed at the trial. The courts below, in this case, have answered these important questions in plain disregard of *United States* v. *Goldstein*, 2 Cir., 120 F. 2d 485, *United States* v. *Coplon*, 2 Cir., 185 F. 2d 629, and *Coplon* v. *United States*, D. C. Cir., 191 F. 2d 749. (See Petition, pp. 7-10.)

4. The government does not dispute that under Count 8 of the indictment (concealment of Livorsi's personal assets) it was required to establish that some element of the offense occurred in the Southern District of New York. In the court below, the government conceded that the "only personal *asset* belonging to Livorsi as to which there is direct and positive evidence of concealment by Livorsi * * * is his New Jersey estate," while it urged that "part" of the concealment of assets in New Jersey consisted of Livorsi's concealment of *tax liability* in the Southern District of New York (Govt. Br. in Ct. of App., p. 34). Here, the fatuous argument that concealment of tax liability is an element of the offense of concealment of assets is abandoned (having apparently served its purpose in the court below), and the government proposes another "concealed" personal asset (in flat contradiction of its concession in the Court of Appeals), namely, moneys allegedly withdrawn by Livorsi from the "American" corporations.

In the first place, neither Present, the agent who testified that Livorsi and the other defendants drew moneys from the "American" corporations (1916-23), nor anyone

else, attempted to establish that these moneys were received by Livorsi or were "concealed" by him in the Southern District of New York. In the second place, Livorsi was charged in another count (Count 9) with fraudulently diverting *corporate* assets to his own use by virtue of these very withdrawals from the "American" corporations. Thus, Livorsi has been convicted under Count 9 of diverting assets which belonged to the corporations, and now the government contends that by withdrawing these very same funds he concealed his own assets.

The government's concession in the Court of Appeals that the only personal asset belonging to Livorsi, concerning which there was direct and positive evidence of concealment, was the New Jersey estate, was not inadvertent. When counsel for the defendants objected at the trial to the materiality of Present's testimony on this subject, the prosecutor made no claim that he intended to establish a concealment of *personal* assets. He stated (1920):

> "It is very material to the concealment of assets in the American Brands Corporation insofar as the tax liability was not paid."

The necessity for a clear definition of the elements of the crime of tax evasion by concealing assets is emphasized by these desperate attempts to justify the conviction under Count 8 in the court below and then in this court by urging contradictory, non-existent elements of the offense.

5. As a matter of fact, the government failed not only to establish a concealment of Livorsi's personal assets in New Jersey, but equally failed to establish that he misappropriated, converted or diverted assets of the "American" corporations. For this case presents the very vital question of whether a mere withdrawal of funds from a corporation by an employee, while that corporation owes taxes to the United States Government, without proof of a fraudulent

or improper purpose, constitutes a concealment of corporate assets (Petition, pp. 27-30).

6. With respect to Count 6 of the indictment (Livorsi's personal return), the government contends that the simple words of the court's charge to the jury, "disregard any income they may have received from Eatsum," do not mean "disregard any income they may have received from Eatsum." The government says (Br. p. 26) that the court's instruction is not "reasonably susceptible" to this "interpretation" (Br. pp. 25-6). We submit that these words are susceptible to no *other* interpretation.

The trial court's elimination from the jury's consideration of any income the defendants may have received from Eatsum, brings before this court the important question of whether a defendant may be convicted of attempting to defeat and evade his personal tax in the absence of proof of a tax deficiency, since the Court of Appeals, in sustaining the conviction, held that the verdict on Count 6 must stand merely because "there was evidence of understatement of income from sources other than Eatsum." This holding is flatly contradicted by authorities in almost all of the circuits, including the Second Circuit. (See Petition, pp. 23-4.)

We respectfully submit that this case brings up for review questions which are extremely important both as matters of constitutional interpretation and in connection with the due administration of justice in the federal courts, and which have not been previously decided by this court.

Respectfully submitted,

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